

1           TIMOTHY GENS  
2       774 Mays Blvd Suite 10-506  
2       Incline Village, NV 89451  
3       (877) 448-1800  
3       Fax (877) 448-1801  
3       thgens@ix.netcom.com

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

9 || TIMOTHY GENS,

CASE NO. 5:10-CV-03220-PVT

**Plaintiff,**

11 || v.

VELLO CORPORATION, CALLVINE,  
INC., and RUDY PRINCE, inclusive,

## Defendants.

**NOTICE OF AND MOTION TO REMAND,  
FOR FEES AND COSTS UNDER 28 USC  
§1447(c), AND FOR SANCTIONS UNDER  
RULE 11**

## I. NOTICE

Please take notice that on Tuesday September 28, 2010 at 10 A.M. or as soon thereafter as may be heard, Plaintiff will move the Court at San Jose, California, for an order remanding the above-entitled cause from the United District Court for the Northern District of California to the Superior Court of the State of California County of Santa Clara, from which it was removed on July , 2010, pursuant to the filing of defendants' Notice of Removal with this Court. Plaintiff further moves for an award of costs and fees which were incurred in connection with the removal of the action to this Court. Plaintiff also moves for sanctions under Rule 11 for sanctions against Defendant Mr. Prince and Defendants' co-counsel GCA Law Partners and Dwyer Murphy Calvert LLP.

1       **II. STATEMENT OF PURPOSE**

2           Plaintiff moves the Court for an order remanding the above-entitled cause from the United  
 3 District Court for the Northern District of California to the Superior Court of the State of  
 4 California County of Santa Clara, from which it was improperly and improvidently removed on  
 5 March 10, 2005, pursuant to the filing of defendants' Notice of Removal with this Court.

6           Plaintiff further moves for an award of costs and fees which were incurred in connection  
 7 with the removal of the action to this Court. Because the Removal was so clearly improper, the  
 8 Court should exercise its discretion to award this sum to the Plaintiff as part of its remand order.  
 9 Plaintiff seeks the Court's permission to present evidence of those costs and fees once the briefing  
 10 schedule is complete or at the hearing on this motion.

11          Plaintiff also moves for sanctions under Rule 11 for sanctions against Defendant Mr.  
 12 Prince and Defendants' co-counsel GCA Law Partners and Dwyer Murphy Calvert LLP. The  
 13 purpose of the removal was solely for the purposes of delay. The removal was filed only after  
 14 Plaintiff had filed document requests on Defendants and a third party, notices of the depositions  
 15 of the Callvine Directors, and the day before a properly noticed hearing on Plaintiff's application  
 16 for a writ of attachment against Defendant Callvine.

17          There are two instances of conduct that make the removal frivolous and are worthy of  
 18 sanctions. First, GCA Law Partners LLP and co-counsel Dwyer Murphy Calvert LLP, know that  
 19 Vello Corporation has its principal place of business in California and as such, is a resident  
 20 Defendant of California. The Dwyer firm represented Callvine during the acquisition which is  
 21 the basis for the debt owed to Plaintiff. Defendants' counsel also knew that the supermajority  
 22 shareholder of Vello, The Whalen Family Trust, also has its principal place of business in  
 23 California and that the documents for the acquisition were signed in California. Yet, these firms  
 24 filed the removal without investigating to learn that Vello had been served prior to the removal,  
 25 which prohibits the removal of the resident Defendant. Second, Defendants' counsel also failed  
 26 to investigate whether Vello consented to the removal action. Instead, the removal is supported  
 27 by the declaration of co-Defendant Mr. Prince which contains the blatantly false statement that  
 28 Vello consents to the removal action.

1 Defendants' counsel has made no attempt to mitigate these errors even after they were  
2 identified in writing. Before filing this motion for sanctions, Plaintiff provided to Defendants'  
3 counsel in writing the above-basis for this motion to remand and the offer to forego the filing of  
4 this motion should Defendants' stipulate to a remand or otherwise correct the errors identified.  
5 Defendants' counsel refused to do so.

6 Plaintiff is entitled to remand of this action because, as is more fully explained in the  
7 supporting Memorandum of Points and Authorities, the supporting Declaration of Timothy Gens,  
8 and the supporting Declaration of Michael Bush (President of Vello), there were at least two  
9 grounds in support of the motion to remand:

10 A. This action was improperly removed in that the Notice of Removal was premised on  
11 complete diversity of citizenship between the Plaintiff and Defendants. Plaintiff was  
12 and is a citizen of the State of California. Defendant was and is a corporation  
13 organized and operating under the laws of Delaware, but with its principal place of  
14 business in the State of California. Defendant claims in its Notice of Removal that its  
15 principal place of business is in Phoenix, Arizona. The action was commenced in the  
16 courts of the State of California, and defendant was served in California, precisely  
17 because this defendant is a citizen of California. Therefore, under the provisions of 28  
18 U.S.C. §1446(b) removal based on diversity was improper. Diversity is proper only if  
19 none of the parties in interest properly joined as defendants is a citizen of the State in  
20 which the action is brought.

21 B. This action was improperly removed in that the diversity of citizenship between the  
22 plaintiff and all the "Doe" defendants is not complete. Defendant's filing of the  
23 Notice to Remove is a sham to prevent the addition of Does that are citizens of  
24 California and would defeat jurisdictional diversity.

25 C. The defendant waived its right to remove by contesting the state court action and filing  
26 a general demurrer that was heard by the state court and an order entered prior to the  
27 filing of the Notice to Remove.

28 This Motion to Remand is timely because it is made within 30 days after the filing of the

1 notice of Removal in the District Court and in accordance with FRCP 6(a).

2 The motion is based on this document Notice Of and Motion to Remand, the Certificate of  
3 Service, the Supporting Declaration of Timothy Gens, the supporting Declaration of Michael  
4 Bush, the Supporting memorandum Of Points Of Authorities, all of the papers and records on file  
5 in this action and on whatever argument and evidence the parties may offer at the hearing of this  
6 motion.

7 Dated: August 19, 2010

*Timothy H. Gens*

10 Timothy Gens  
11 Plaintiff

12 CERTIFICATE AND PROOF OF SERVICE BY E-FILING AND MAIL

13 I am a citizen of the United States and reside in Santa Clara County, California. I am over the age of  
14 eighteen years and not a party to the within entitled action. On August 19, 2010 I caused the following  
15 document(s;

16 **NOTICE OF AND MOTION TO REMAND, FOR FEES AND COSTS UNDER 28 USC  
17 §1447(c), AND FOR SANCTIONS UNDER RULE 11**

18 To be electronically filed through ECF in the Northern District of California and to be placed in a sealed  
19 envelope, addressed to James L. Jacobs, GCA Law Partners LLP, 1891 Landings Drive, Mountain View,  
20 CA 94043 with postage thereon fully prepaid to be deposited with the United States first class mail at Los  
21 Altos, CA that same day. I declare under penalty of perjury under the laws of the State of California that  
22 the above is true and correct. Executed at Palo Alto, CA on August 19, 2010.

*Laura Gens*

23  
24 Laura Gens  
25  
26  
27  
28